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# ***I. Consolidation of Statutory Authority***

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## **Isn't there only one set of laws governing procurement?**

No, different sets of laws have been enacted to govern different types of transactions. This legal patchwork approach has caused tremendous problems for both state agencies and the private sector. There is one set of laws governing services contracting, such as window washing, and a separate set of laws governing contracts for consulting services. There is another set of laws governing the purchase of materials, supplies and equipment (these items are often referred to as “commodities”), and yet another set of laws governing the acquisition of electronic data processing and telecommunications (“information technology”) goods and services. Also, there are provisions scattered throughout multiple codes which apply to various contracting laws. This tangled maze of laws has become so complex that trying to understand and follow all the various rules has become far more important than acquiring the needed goods or services on a timely basis at a fair price.

## **How are these multiple sets of laws different from each other?**

There are many ways the laws differ. Here are just a few examples:

- Statutes governing the purchase of commodities require that the State award its contracts to the “lowest responsible bidder meeting specifications.” Statutes governing the acquisition of information technology permit the State to award on the basis of a “value-effective” methodology, taking into account factors other than cost.
- Statutes governing the purchase of commodities and the acquisition of information technology require that contract award protests be resolved by the State Board of Control. Statutes governing services and consulting services contracting require that contract award protests be resolved by the Department of General Services.
- Archaic statutes governing the purchase of commodities provide that bidders be given 24-hour telegraphic notice if their (lower) bid is to be rejected in favor of a higher bid. Statutes governing services contracting do not require such notice, but instead require that state departments post in a public place, for five working days, a notice of their intent to award a contract.
- Statutes governing services contracting require state departments to advertise certain solicitations in the California State Contracts Register. No such advertisement is required for commodity contracts or for information technology contracts, unless they are for services.
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# ***I. Consolidation of Statutory Authority***

## ***(Continued)***

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### **What kinds of problems do these different laws cause?**

The problems are as numerous as the differences! Unnecessary protests are one problem. For instance, a bidder who believes a state department did not conduct an acquisition under the right set of statutes might protest, asking the State to rebid under a different set of statutes. An example of how this can happen is when purchasing officials decide to conduct a specific acquisition as a commodity when, due to the amount of services also being provided, it may also be viewed as a services acquisition. In these situations, not only can suppliers become confused about which protest process to use, but, some suppliers have used the fact that two different organizations have protest oversight as grounds to protest the intended contract award. Sometimes, the State ends up in Court over these very issues, costing the taxpayers an enormous amount money and service delay.

One of the biggest problems for suppliers and state officials alike is the confusion caused by so many duplicative and conflicting rules. Each statute is different; consequently, it stands to reason that the processes are different as well, and they are! There simply is no uniform set of rules for everyone to follow, and this costs both the public and private sectors time and money.

Horror stories abound on this particular problem. Consider these few:

- For a period of several months, one of the State's data centers attempted to obtain authorization and approval of a contract for a newsletter subscription produced by a leading technology consulting services firm. A principal contributor to the inexcusable time delay for approval was the differences of opinion among various state officials as to which set of statutory provisions (information technology, services, commodities, or consulting services) was applicable to the transaction.
- One of the State's centralized support service departments needed to obtain authorization and approval of a statewide contract for refurbished laser printer toner cartridges. Differences of opinion were expressed by various state officials as to which set of statutory provisions (information technology, commodities, or services) was applicable to the transaction.
- One of the State's major data centers routinely contracts for storage of their back-up data files. There has been lengthy discussions among state officials regarding which set of statutory provisions applies to this type of transaction (information technology or services), causing unacceptable delays in the contracting process.
- The State has been delayed in several recent attempts to complete purchases for video-enhanced, computerized law enforcement firearms training systems. In recent years, each time attempts were made to purchase these systems as commodities, the State's solicitation had to be canceled only to be released later as an information technology transaction.

### **How will CARA resolve these problems?**

CARA proposes to consolidate the statutes governing services and consulting services contracting, commodities purchasing, and information technology acquisitions into one statute -- Division 3 of the Public Contract Code. The same rules will apply to all transactions! There are no distinctions made between types of transactions, with the exception of some focused attention on information technology acquisitions. The rules governing competitive bidding, advertising, bid evaluation methodologies, and protests will be the same for all types of contracting.

## ***II. Repeal of Statutory Exemptions***

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### **What is meant by “statutory exemptions” as they relate to CARA?**

In general, a “statutory exemption” is a law that exempts one or more departments or specific transactions from contracting provisions contained in the statutes. California’s current statutes provide numerous exemptions of various types. If a department or program wants to be exempt from existing public contracting provisions, they must get this authority through legislation. Under current law, the Department of General Services has limited ability to grant relief from statutory limitations and restrictions, even when a valid case is made.

### **What kind of exemptions are there currently?**

Numerous exemptions exist, and each has its own uniqueness. Examples of the most common include:

- Exemptions of certain contractual transactions from some or all of the provisions in the Public Contract Code
- Exemptions of certain contractual transactions from review and approval of the Department of General Services
- Exemptions of certain departments from provisions contained in California’s various statutes.

### **Why are these exemptions being repealed or deleted in CARA?**

The best way to answer that question is to quote **existing** exemption language.

*“In order to achieve maximum cost savings the Legislature hereby determines that an expedited contract process for contracts under this section is necessary. Therefore, contracts under this article shall be exempt from the provisions of Chapter 2 (commencing with Section 10290) of Part 2 of Division 2 of the Public Contract Code.”*

This language alone sends a message: the contracting process set forth currently in the Public Contract Code has become overly burdensome, time consuming, and costly for state departments. Clearly, the contracting statutes must provide for expedited processes when appropriate. They must provide less costly contracting alternatives for state officials and the taxpayer, and they must simplify the contracting processes. All of these concepts are present in CARA.

CARA removes barriers to expedited processing, enhances cost-effective contracting alternatives, and simplifies contracting processes. Needs for numerous “blanket” exemptions will no longer exist. Increasing the number of exemptions erodes the State’s enormous buying power. Eliminating exemptions enhances the State’s ability to achieve maximum cost savings through the use of its consolidated buying power.

## ***II. Repeal of Statutory Exemptions (Continued)***

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### **Why does CARA still exempt some agencies from the Public Contract Code?**

Certain “agencies”, including the Legislature, the Judiciary, the California State Lottery, the University of California, the State Compensation Insurance Fund, and the Bureau of State Audits have been exempted from all of the provisions of Chapters 2, 3, and 3.5 of the Public Contract Code (which CARA replaces) for many years. Specific laws governing their contracting activities are set forth elsewhere, and some are protected by the Constitution. CARA does not propose, nor contemplate, any changes to the Constitution, nor these long-standing exemptions.

### **Some agencies will still want to be exempted from DGS review and approval. Will this be possible if CARA is enacted?**

Yes. CARA retains all existing statutory exemptions (see Public Contract Code Sections 8000 and 25072). CARA also gives the Director of the Department of General Services the authority to administratively grant additional exemptions from DGS review and approval. Agencies which do not currently have exemptions, but may wish to request one in the future, will not have to rely on legislation to accomplish this task.

### ***III. Decentralization of Procurement***

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#### **What kind of contracting authority do State departments have now?**

Currently, State departments are authorized by law to enter into contracts for services and consulting services. Except for exempted transactions (both statutory and administrative exemptions exist), the remainder of these contracts generally are subject to review and approval of the Department of General Services (DGS). Except for purchases of materials, supplies and equipment (“commodities”) **under \$100**, and information technology goods and services, the DGS has the authority to contract. However, upon request, DGS may delegate its authority to State departments subject to DGS oversight of these activities.

#### **What additional authority does CARA propose to decentralize?**

CARA transfers the authority and associated operations of purchasing commodities and information technology from DGS to state agencies, allowing them to act on their own behalf. The DGS will have strengthened oversight and approval authority. CARA does not affect departments’ authority to contract for services or consulting.

#### **What is the rationale for further decentralizing procurement authority?**

In short, decentralized procurement places authority and accountability for purchasing goods and services closer to the actual business needs--in the hands of individual agencies who can obtain a best value outcome. As with any purchase of goods or services, the customer, in this case, individual state departments, are usually in the best position to make decisions regarding their own business needs and requirements. Additionally, departments can more effectively determine the suitability of a bidder’s product to a particular business need or requirement.

Agencies, involved in their own program and acquisition planning, set the criteria indicating what constitutes long and short term value to the agency. When purchases are made, agencies seek goods and services that meet these expectations and needs. As part of this process, preliminary investigations are conducted to determine what can be expected from the marketplace. Currently, agencies pass this preliminary acquisition information to the DGS, whose staff then conduct the buying process for the customer agencies. This step adds extra processing time to the purchasing cycle, and the resulting purchase may not be the best solution for their business need.

#### **Does CARA transfer additional procurement authority from General Services’ Procurement Division to every agency, regardless of an agency’s size or capability?**

Yes. CARA transfers goods and IT procurement authority to all agencies on January 1, 2000, providing for a two-year transition period (Public Contract Code 25110). However, DGS will maintain purchasing expertise and support agencies who are unable or unwilling to take on the responsibility.

#### **How will the Department of General Services help agencies prepare to assume this additional authority?**

CARA requires that DGS develop a complete set of procedures and guidelines to govern the acquisition process and guide officials in making the most appropriate procurement choices (Public Contract Code 25093). Additionally, DGS will provide comprehensive training for all state employees involved with acquisitions to assure compliance with the procedures and guidelines (Public Contract Code 25466-25467).

## ***IV. Resolution of Award Protests***

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### **How does the current award protest process work?**

Under current law, when there is an Invitation for Bid (IFB) involving services or consulting services contracts, state agencies must provide the low bidder with a five-working day telegraphic notice that their bid is being rejected in favor of a higher bidder and, upon request, must post a public notice of intent to award. Requests for Proposal (RFP) require state agencies to post a five-day notice of their intent to award a contract. For both IFBs and RFPs, if a bidder files a proper protest before the contract is awarded, the State is prevented from awarding the contract until the protest is resolved by the Department of General Services.

For commodity purchases (formal bids), the Department of General Services, Procurement Division must provide (lower) bidders 24-hour telegraphic notice that their bid is being rejected in favor of a higher bidder, and must also post a notice of intent to award upon the request of any bidder. If any bidder protests the award during the 24-hour notice period, then the purchase order or contract may not be awarded until the protest is resolved by the State Board of Control.

For information technology transactions (formal bids), the Department of General Services, Procurement Division, or other state departments under delegated authority from the Department of General Services, must post a notice of their intent to award a contract, and then cannot award the contract for a period of 5 working days following that posting. If a bidder protests within that 5-day period, then the State is prevented from contracting until the protest is resolved by the State Board of Control.

### **How long does it take to resolve award protests?**

It is a lengthy process by any measure. While the Department of General Services, Office of Legal Services, averages about a month to resolve service contract protests, the State Board of Control averages more than triple that amount of time for all other types of protests. Because the resolution process is so inflexible and takes so long, many bid awards are just canceled shortly after receipt of a protest, and then rebid with an adjusted solicitation. Sometimes this process can be repeated for 1 to 2 years.

### **It seems everyone is unhappy with the current protest process. Why?**

Numerous reasons. The contract award is always delayed by a protest, which creates tremendous uncertainty for all participants, delays delivery of services to the taxpayers, and increases costs. It costs protesting bidders a tremendous amount of time and money to gather evidence, prepare protest documentation, and actually present their case before the Department of General Services or the State Board of Control. It costs the intended awardees (the bidder to whom the State wants to award the contract) about the same amount to fight the protest, and it costs state officials time and resources preparing documentation, presenting evidence, and defending their decision.

Many participants feel the current protest process is unfair. Some bidders protest just to get another chance at the business. Quite often, if a bidder held the contract prior to the new award, they will protest just to keep the existing contract (and revenue) in place for as long as possible. The current protest process often ends with state officials being the targets of unsubstantiated allegations; with intended winning suppliers risking losing a contract they just won; and with losing bidders feeling they never had a fair opportunity.

## ***IV. Resolution of Award Protests***

### ***(Continued)***

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#### **How does CARA propose to fix these problems?**

CARA proposes that award protests be resolved using a fast and fair administrative process whereby full and open communication methods will be used to improve understanding, resolve differences, and address any fairness or public trust problems (Public Contract Code 25310-25319). This method is currently being used by the federal government, most other states, and a variety of local governments.

#### **Will this new process clog the courts with more protest cases?**

No. In conversations with the various other states and local governments using the same protest procedure as CARA proposes, officials indicate that the process has not increased the number of protest cases being filed in court.

It behooves both bidders and the State to have an informal protest resolution rather than a quasi-judicial hearing or even worse, proceeding to court on every protest. Quite often, an open dialogue is more effective in reaching a mutual understanding and resolution than the adversarial positions created by the judicial process. Furthermore, informal reviews are more timely and less costly to both the protesters and the taxpayers. No one can say with any certainty that one type of process will ultimately result in more cases being decided in court. It is clear, however, that the current protest process has not decreased the number of cases being resolved by the courts, nor the frustration and expense to the private and public sectors.

#### **How can one participate in the development of this new process?**

CARA provides that regulations governing the protest process be established by the Department of General Services. California's regulatory process requires that regulations be established in an open environment, providing ample time and opportunity for public comment and input to the process.



## *V. How You Can Help*

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**Communicate your position by writing the Bill's Author or any Senate G.O. Committee member.**

### *Senate Governmental Organization Committee*

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**Please provide the Department of General Services with a copy of your letter. Send to: Happy Chastain, Office of Legislation, Department of General Services, 1325 J Street, Suite 1910, Sacramento, California 95814. FAX: 916-323-6567**